

1
2 **UNITED STATES DISTRICT COURT**
3 **DISTRICT OF NEVADA**

4 *** * ***
5 UNITED STATES OF AMERICA,)
6 Plaintiff,) 2:11-cr-00110-RLH -VCF-1
7 v.) **O R D E R**
8 DE RONG SHANG,)
9 Defendant.)
_____)

10 Before the court is defendant De Rong Shang's Motion To Strike Surplusage. (#83). The
11 government filed an Opposition (#94), and defendant Shang filed a Reply (#104).

12 Also before the court is defendant Shang's Motion for a Bill of Particulars. (#84). The
13 government filed an Opposition (#95), and defendant Shang filed a Reply (#105).

14 Defendant Shang also filed a Motion To Compel Discovery. (#85). The government filed an
15 Opposition (#93), and defendant Shang filed a Reply (#99). The court held a hearing on January 20,
16 2012.

17 **Procedural History**

18 On March 22, 2011, the government filed an indictment against defendants Shang and Eaton for
19 mail fraud (18 U.S.C. § 1341), conspiracy to commit mail fraud (18 U.S.C. § 1349), and aiding and
20 abetting (18 U.S.C. §2). (#1). On April 29, 2011, Mr. Shang appeared before the court at his initial
21 appearance and arraignment and plea, and entered a plea of not guilty. Subsequently, on May 5, 2011,
22 Ms. Eaton made her initial appearance and entered a plea of not guilty. Upon stipulation by the parties
23 (#28), the court continued the trial date until October 17, 2011. (#29).

24 On July 15, 2011, defendant Shang filed a motion to dismiss the indictment, because "[b]y virtue
25 of the [i]ndictment's own allegations,...the [g]overnment cannot state an offense under Mail Fraud
26 statute, 18 U.S.C. § 3141." (#30). On the same day, the defendants filed a joint motion to sever

1 defendants' trial. (#31). After oral argument on the motion to dismiss (#30), on September 26, 2011,
2 the court filed a report and recommendation (#51), recommending that the indictment be dismissed
3 because the indictment did not demonstrate that the mailing of the letters to the bank were in furtherance
4 of the scheme to defraud, and because the mailings occurred *after* the defendants completed the scheme.
5 The government filed an objection (#52) on September 26, 2011, and defendant Shang filed a response
6 to the objection on October 3, 2011. (#53).

7 On October 7, 2011, the court issued an order granting the motion to sever the trials of
8 defendants Eaton and Shang. (#56). The court held that severance was warranted because of defendant
9 Eaton's pre-indictment interview that contained "inculpatory statements...which may be prejudicial to
10 Mr. Shang and deny his confrontation rights guaranteed by the United States Constitution." *Id.* The
11 court stated that neither redaction of the interview nor limited instructions would secure a fair trial to
12 defendant Shang. *Id.*

13 Trial was set for October 17, 2011, at 8:30 a.m. On October 11, 2011, the government filed
14 superseding indictments as to Shang and Eaton, alleging claims for conspiracy to commit wire fraud
15 (18 U.S.C. § 1349), wire fraud (18 U.S.C. § 1343), and aiding and abetting (18 U.S.C. §2), relating to
16 events that allegedly occurred between December of 2006, through at least April of 2007. (#57). Wire
17 fraud is defined as "having devised or intending to devise any scheme or artifice to defraud, or for
18 obtaining money or property by means of false or fraudulent pretenses, representations, or promises,
19 transmits or causes to be transmitted by means of wire, radio, or television communication in interstate
20 or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such
21 scheme or artifice..." 18 U.S.C. § 1349.

22 On October 12, 2011, at calendar call, the Judge Hunt held that in light of the superseding
23 indictment (#57), the motion to dismiss (#30) was moot. The trial for Shang was set for October 31,
24 2011, but was subsequently continued to February 6, 2012. (#69). Pursuant to Judge Hunt's Order
25 Regarding Trial, calendar call is set for February 2, 2012, and the parties are required to provide to the

1 courtroom administrator and file with the court all exhibit lists, proposed voir dire, proposed jury
2 instructions, witness lists, and trial briefs. (#109).

3 On December 21, 2011, defendant Shang filed several motions that are now pending before the
4 court. This order will address defendant Shang's motion to compel (#85), motion for a bill of
5 particulars (#84), and motion to strike surplusage (#83).

6 **Motion To Compel (#85)**

7 In the motion to compel discovery, defendant Shang asks this court to compel discovery in the
8 form of (1) producing witness lists, both expert and non-expert, (2) deposing an unavailable witness,
9 and (3) producing specific documents: bank records, surveillance, plea agreements, etc. (#85).

10 **A. Government Witness List**

11 **1. Arguments**

12 Defendant asks this court to order the government to produce "a meaningful list of all of the
13 witnesses it intends to call at trial." *United States v. Grace*, 526 F.3d 499, 509 (9th Cir. 2008).
14 Defendant argues that the government should produce this list, in order to afford Mr. Shang effective
15 confrontation and cross-examination of the witnesses as guaranteed by the Sixth Amendment. (#85).

16 The government opposes this request, and argues that it is not required to identify witnesses it
17 intends to call at trial. (#93); *United States v. Sukumolachan*, 610 F.2d 685, 688 (9th Cir. 1980). The
18 government asserts that, although the Ninth Circuit has not flatly precluded the district court from
19 ordering discovery of potential witnesses, the Ninth Circuit has held that a defendant must make a
20 *specific showing* that discovery of the potential witnesses is material to the preparation of their defense
21 and reasonable in light of the circumstances. *Id*; *United States v. Richter*, 488 F.2d 170, 175 (9th Cir.
22 1973). The government argues that the defendant has only shown a *general* need for the witness list,
23 and therefore, the request is insufficient and does not support an order of this nature. *Id*.

24 The government asserts that it will turn over a witness list in accordance with this court's
25 standard order regarding trial, as the defendant has shown no reason to deviate from that order. (#93).

1 With regard to expert testimony, the government asserts that it will turn over the names and a summary
2 of the testimony in compliance with the joint discovery agreement and Federal Rule of Criminal
3 Procedure 16(a)(1)(G). *Id.*

4 In defendant Shang's reply, he presents arguments relating to the disclosure of the non-expert
5 witnesses. (#99). Defendant Shang argues that obtaining the witness list before trial is material to Mr.
6 Shang's defense, because of the magnitude of the conspiracy alleged: (1) "the alleged conspiracy in this
7 case involved numerous co-conspirators and/or recruits," (2) the government disclosed for the first time
8 in an opposition to the motion to exclude Linda Zeng, that Ms. Zeng provided the FBI with "ten names"
9 of witnesses, (3) the conspiracy allegedly spanned over a period of six months between 2006 and 2007,
10 and (4) the events occurred at three separate casinos, increasing the number of witnesses who could
11 potentially be called to testify. *Id.* Defendant Shang also asserts that "in light of the four-year pre-trial
12 delay, most employees from the subject casinos are no longer employed or have left the jurisdiction,"
13 which gives the government a prejudicial advantage over Mr. Shang to investigate the case. *Id.* As far
14 as the "general" statement of need that the government argues defendant has demonstrated, defendant
15 contends that "in light of the specific circumstances" discussed above, Shang has demonstrated that the
16 information is material to his defense and warranted under the legal authority. *Will v. United States*, 389
17 U.S. 90, 99 (1967).

18 **2. Relevant Law**

19 Fed. R. Crim. P. 16(a) governs discovery and inspection of the government's evidence. Rule
20 16(a)(1)(G) provides that "[a]t the defendant's request, the government must give to the defendant a
21 written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of
22 the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G).
23 "Although Rule 16 does not expressly mandate the disclosure of nonexpert witnesses, it is not
24 inconsistent with Rule 16 and Rule 2 for a court to order the government to produce a list of such
25 witnesses as a matter of its discretion." *United States v. Grace*, 526 F.3d 499, 510 (9th Cir. 2008). Rule

1 16 “does not entitle the defendant to a list of such witnesses, but by the same token it does not suggest
2 that a district court is prohibited from ordering such a disclosure.” *Id.* at 511. “[A] district court...may,
3 in appropriate circumstances require the government to disclose a final list of its proposed trial
4 witnesses and has the authority to enforce such an order.” *Id.* at 513.

5 **3. Discussion**

6 The court’s order regarding trial indicates that the witness lists are to be provided to the
7 courtroom administrator and filed with the court on February 1, 2012. (#109). The court finds that the
8 federal rule regarding expert witness lists is very clear, and dictates that upon the defendant’s request,
9 “the government must give to the defendant a written summary of any testimony that the government
10 intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief
11 at trial.” Fed. R. Crim. P. 16(a)(1)(G). Thus, the government is hereby ordered to provide defendant
12 Shang with information regarding its expert witnesses in accordance with Rule 16 by Tuesday, January
13 24, 2012, at 4:00 p.m.

14 With regard to the nonexpert witnesses, the court finds that it is appropriate in these
15 circumstances for the government to provide defendant Shang with its final list of proposed trial
16 witnesses. *Grace*, 526 F.3d at 513. The allegations involve multiple co-conspirators and recruits,
17 several casinos with a number of employees that could be potential witnesses, and occurred over four
18 years ago, which provides the government with an advantage with regard to investigating and
19 interviewing witnesses. See *United States v. Sukumolachan*, 610 F.2d 685 (9th Cir. 1980)(holding that
20 the defendant was not entitled to the witness list prior to trial when the defendant was "well aware of
21 [the] existence and possible testimony" of the informant that testified, and the other witness provided
22 straightforward information about where the defendant lived.). Further, as the trial is nearing, with
23 calendar call roughly a week away, ordering the government to produce its witness list is not
24 unreasonable, and will not be used for the purpose of discovery.

25 . . .

1 **B. Deposing Out-Of-State Witness**

2 **1. Argument**

3 Defendant Shang asks this court to permit the deposition of out-of-state witness Mr. John To.
4 (#85). Defendant Shang asserts that Mr. To, a former casino host for one of the subject casinos during
5 the relevant time period, is the only witness¹ that can provide exculpatory testimony that will support
6 Shang's defense. *Id.* However, Mr. To has informed counsel that he will "most likely not be able to
7 attend the upcoming trial," because of his financial situation and work schedule. *Id.* Therefore,
8 defendant Shang asks for an order permitting defendant to take the deposition of *material* witness Mr.
9 To in San Gabriel, California, by means of video transcription. *Id.*

10 The government opposes the request (#93), and asserts that the defendant has not demonstrated
11 the requisite "exceptional circumstances" that warrant permitting the deposition of a prospective
12 witness. Fed. R. Crim. P. 15(a)(1). The government argues that there is no evidence that the witness
13 is unable to come to Las Vegas, as he is not sick or living substantially far away. (#93). The
14 government asserts that the reasons defendant Shang provides in support of his motion are "grossly
15 insufficient." *Id.*

16 In support of the request, defendant Shang provided the court with the affidavit of Mr. To, to
17 explain why Mr. To is unable to attend the trial. (#99-1). Mr. To asserts in his affidavit that he lives
18 in Monterrey Park, California, is currently in foreclosure and is going through a loan modification
19 process (where he must make certain monthly payments at a reduced rate *on time*), and that he just
20 began working at MGM resorts on an hourly basis. *Id.* Mr. To contends that if he misses work, he will
21 receive a lower paycheck, which will "impact his ability to attain the amount of money [he] need[s], per
22 month, to ensure that [he] does not miss or make a late mortgage payment." *Id.* The defendant argues

23 ¹Defendant contends that there is a missing witness, Mr. Slack, and that Mr. To was employed by Mr. Slack,
24 and worked on Slack's "Asian Marketing" team. Mr. Slack, as a manager at several casinos, signed off on most of the
25 alleged "credit received." Mr. Slack has fled since the indictment was filed, and is unavailable to testify. Mr. To, as
26 Slack's employee with knowledge of the events, is the only individual that can provide this exculpatory testimony.

1 to the court that in light of these “exceptional circumstances,” permitting the deposition of material
2 witness Mr. To is warranted. (#99).

3 **2. Relevant Law**

4 Pursuant to Fed. R. Crim. P. 15(a)(1), “[a] party may move that a prospective witness be deposed
5 in order to preserve testimony for trial. The court may grant the motion because of *exceptional*
6 *circumstances* and in the interest of justice. If the court orders the deposition to be taken, it may also
7 require the deponent to produce at the deposition any designated material that is not privileged,
8 including any book, paper, document, record, recording, or data.” The Ninth Circuit has held that “[i]t
9 is within the sound discretion of the trial court to grant or deny a motion to depose a proposed witness
10 in a criminal trial.” *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978)(denying the
11 request to depose witnesses, three of whom were fugitive co-defendants and one who was an unindicted
12 co-conspirator whose location was unknown.).

13 When determining if the deposition is warranted, the court looks at whether the unavailable
14 witness is the defendant’s own witness, the deposition is being used as a discovery tool, “the deponent
15 would be available at the proposed location for deposition and would be willing to testify,” and whether
16 “the safety of United States officials would be compromised by going to the foreign location.” *United*
17 *States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978)(denying a motion to take the deposition of the
18 government’s witness which would be used for discovery purposes); *United States v. Olfason*, 213 F.3d
19 435, 442–443 (9th Cir. 2000)(denying the deposition of Mexican individuals, because there was no
20 evidence that the witnesses would cooperate and it was dangerous to send the American attorneys and
21 investigators into Mexico for the depositions).

22 **3. Discussion**

23 The court finds that defendant Shang has demonstrated that “exceptional circumstances” exist
24 that support permitting the deposition of Mr. To. Fed. R. Crim. P. 15(a)(1). Mr. To is a material
25 witness whose testimony is unavailable through any other source, and it is in the interest of justice to
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1 preserve his testimony for trial. *Id.* Mr. To is willing to testify and cooperate, but is unable to attend
2 trial for fear of losing his home. See *Olfason*, 213 F.3d at 442–443. Further, the deposition of Mr. To
3 will not take place in a foreign nation, and there is no concern for the safety of the attorneys in traveling
4 to California for the deposition. See *Id.*

5 Thus, defendant Shang is permitted to take Mr. To’s deposition, and, to ensure that the
6 deposition is not being utilized as a discovery tool, defense counsel shall steer clear of questions other
7 than those required to establish facts known by the witness which can be admitted into evidence at trial.
8 See *Rich*, 580 F.2d at 934. The government shall make objections during the deposition as it would
9 during the trial.

10 **C. Additional Production of Discovery**

11 **1. Arguments**

12 On November 21, 2011, defense counsel delivered a discovery letter to the government seeking
13 certain documents and information, as well as proposing to enter into evidentiary stipulations. (#85-2).
14 Defendant still seeks to obtain several items, and asks this court to order the government to produce
15 such documents. (#85). After the government provided its responses to the requests in its opposition
16 (#93), the defendant still disputed the government’s responses relating to three forms of discovery: (1)
17 records from a new subpoena allegedly served upon the subject Bank of America in or about November
18 2011, (2) a written summary of any expected testimony of any expert witnesses the government intends
19 to introduce at trial, and (3) notice of government’s intention to use evidence at trial pursuant to Rule
20 12(b)(4)(B) and 16(a)(1)(E)(ii). (#99).

21 The government stated in its opposition, that it would provide defendant Shang with a copy of
22 the Bank of America records when it receives the records. (#93). At the hearing held on January 20,
23 2012, the government told the court that it received some documents in response to the subpoena, and
24 that it had produced those documents in an email to defense counsel. Further, the government asserted
25 that it believed that there were still checks from the bank that would be forthcoming. Defense counsel
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1 asserted during the hearing the that counsel did not receive any documents that were responsive to the
2 subpoena and was not aware of what specific records the subpoena sought.

3 With regard to the expert witness list, defendant Shang asserts that the government is required
4 to provide the list pursuant to Fed. R. Crim. P. 16(a)(1)(G). Defendant Shang also argues that the
5 government is required to provide the defendant with its intent-to-use evidence under Rule 12, and that
6 the exhibit list should be provided before calendar call in light of the thousands of pages of documents
7 involved in the action.

8 **2. Relevant Law**

9 As the court has previously stated, Rule 16(a)(1)(G) requires that the “government must give
10 to the defendant a written summary of any testimony that the government intends to use under Rules
11 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial.” Fed. R. Crim. P.
12 16(a)(1)(G). Pursuant to Rule 12(b)(4)(B), “[a]t the arraignment or as soon afterward as practicable,
13 the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)©,
14 request notice of the government’s intent to use (in its evidence-in-chief at trial) any evidence that the
15 defendant may be entitled to discover under Rule 16.” Fed. R. Crim. P. 12(b)(4)(B). Rule
16 16(a)(1)(E)(ii) provides that “[u]pon a defendant's request, the government must permit the defendant
17 to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects,
18 buildings or places, or copies or portions of any of these items, if the item is within the government's
19 possession, custody, or control and...the government intends to use the item in its case-in-chief at trial...”
20 Fed. R. Crim. P. 16(a)(1)(E)(ii).

21 **3. Discussion**

22 During the hearing, the government stated that it would provide defendant with a copy of the
23 Bank of America subpoena and any records it has obtained to date. Therefore, the government must
24 provide defendant Shang with a copy of the subpoena and the bank records it has in its possession by
25 Tuesday, January 24, 2012, at 4:00 p.m. If the government fails to do so, the court may prohibit the
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1 government from introducing the records at trial. *See* Fed. R. Crim. P. 16(d)(2)©.

2 As the court ordered the government to provide the defendant with the expert witness list in
3 section A3 above, the court need not address this issue here. *See* Fed. R. Crim. P. 16(a)(1)(G)(requiring
4 the production of a summary of the government's expert's testimony.). With regard to the intent-to-use
5 evidence, the government is ordered to provide the defendant with notice of any evidence it intends to
6 use in its "evidence-in-chief" by Tuesday, January 20, 2012, at 4:00 p.m. *See* Fed. R. Crim. P.
7 12(b)(4)(B) and 16(a)(1)(E)(ii). The court's order regarding trial requires the parties to file and provide
8 the court with their exhibit lists at calendar call on February 1, 2012. As the court is only requiring the
9 production of the exhibit list roughly a week before calendar call, and as there is allegedly thousands
10 of pages of discovery, the order is not unreasonable and is in the interest of justice.

11 **Motion For Bill of Particulars (#84)**

12 Defendant Shang seeks a bill of particulars with regard to the forfeiture allegation in the
13 indictment and the name and addresses of all unindicted co-conspirators that the government intends
14 to call as witnesses against Shang. (#84).

15 **A. Forfeiture Allegations/ Co-Conspirators**

16 **1. Arguments**

17 With regard to the forfeiture allegations, the defendant asserts that the allegation is "overinflated
18 and contradicts" the indictment's actual allegations by approximately eight hundred thousand dollars
19 (\$800,000). *Id.* The defendant argues that the indictment fails to apprise Shang of the "full extent of
20 the charges levied against him, because it fails to allege what acts beyond those set forth in the "overt
21 acts" section of the indictment amount to a monetary loss of more than a million dollars." *Id.*; See
22 *United States v. Kendall*, 665 F.2d 126, 130 (9th Cir. 1981) (holding that "[t]he test for whether a bill
23 of particulars is necessary is 'whether the indictment sets forth the elements of the offense charged and
24 sufficiently apprises the defendant of the charges to enable him to prepare for trial.').

25 The government argues that the forfeiture allegation is the "total loss from the entire scope of
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1 the conspiracy,” and that included in the “several thousand pages of discovery,” are the financial records
2 that encompass the entire conspiracy and the individuals involved. (#95); *United States v. Mitchell*, 744
3 F.2d 701 (9th Cir. 1984)(holding that full discovery obviates the need for a bill of particulars.”). Thus,
4 the government argues, the bill of particulars is unnecessary. (#95).

5 As far as the information relating to the co-conspirators, defendant Shang argues that, in light
6 of the conspiracy charge, the court should order the government to produce particularized information
7 regarding the identities of all alleged co-conspirators, including dates, locations, and nature of any overt
8 acts allegedly committed by Mr. Shang and each of the identified co-conspirators. (#84). The
9 government opposes this request, and asserts that the indictment contains all the elements of the offense,
10 specifically describes the conspiracy by listing the individual transactions, and fairly informs the
11 defendant of the charges, and that the manner and means and overt acts sections are over a dozen
12 paragraphs and span 6 pages. (#95). The government asserts that it has provided complete discovery,
13 and that the financial records and reports, which include records related to any co-conspirator and
14 uncharged relevant conduct, are included in that discovery. (#95).

15 **2. Relevant Law**

16 “A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment
17 or information contains notice to the defendant that the government will seek the forfeiture of property
18 as part of any sentence in accordance with the applicable statute. The notice should not be designated
19 as a count of the indictment or information. The indictment or information need not identify the
20 property subject to forfeiture or specify the amount of any forfeiture money judgment that the
21 government seeks.” Fed. R. Crim. P. 32.2(a).

22 “The bill of particulars has three functions: to inform the defendant of the nature of the charge
23 against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger
24 of surprise at the time of trial, and to enable him to plead his acquittal or conviction in bar of another
25 prosecution for the same offense when the indictment itself is too vague, and indefinite for such

1 purposes." *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979). Full discovery, however,
2 "obviates the need for a bill of particulars." *Id.*; See also 8 Moore's Federal Practice P 7.06(1) at 7-33.

3 **3. Discussion**

4 As the court has ordered the government to provide defendant Shang with full discovery,
5 including bank records, witness lists, and exhibit lists, the court finds that defendant Shang will be fully
6 apprised of the "nature of the charge[s] against him," will not face any "surprise at the time of trial,"
7 and will be able to plead his "acquittal or conviction in bar of another prosecution." *Id.*

8 **Motion To Strike Surplusage (#83)**

9 Defendant Shang asks this court to strike the following surplusage in the indictment: (1)
10 allegations and/or references to Yuli Eaton in whole or part pursuant to Judge Leavitt's order severing
11 defendants (#56), (2) the forfeiture allegation in whole or in part, and (3) paragraph 12(I) of the
12 indictment. (#83). Defendant Shang asserts that these items, if shown to the jury, would be prejudicial
13 to defendant. *Id.* Further, the defendant asks this court to amend the indictment to reflect the
14 defendant's actual American name, Owen Shang. *Id.*

15 Pursuant to Fed. R. Crim. P. 7, "[u]pon the defendant's motion, the court may strike surplusage
16 from the indictment or information." The rule is intended to "protect the defendant against prejudicial
17 or inflammatory allegations that are neither relevant nor material to the charges." *United States v.*
18 *Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988). However, even if facts are "somewhat prejudicial," they
19 may be "relevant material to the charge" in the indictment, and therefore would withstand a motion to
20 strike surplusage. *Id.* at 373. In addressing amendments to the indictment or information, Moore's
21 Federal Practice Criminal Procedure § 607.06 states that "[i]f a trial jury is permitted to see the
22 indictment, and if any language of that indictment is surplusage, the preferable course is to prepare a
23 retyped "clean" version of the indictment omitting any language to be disregarded without any
24 indication of its omission."

25 The government represented to the court during the hearing that in his experience with trials
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1 before Judge Hunt, the indictment will not be read to the jury during the trial or given to them during
2 deliberations. Therefore, the parties and the court are proceeding with the understanding that the
3 indictment will at no time be read or given to the jury. Thus, defendant Shang's requests to strike
4 several items from the indictment because of possible prejudice should be moot. However, if Judge
5 Hunt decides at any time during the trial to permit the indictment to be read or given to the jury, the
6 following rulings will govern, and the indictment shall be amended accordingly. *See* Moore's Federal
7 Practice Criminal Procedure § 607.06.

8 **A. Reference To Yuli Eaton**

9 **1. Arguments**

10 Defendant Shang asserts that despite the Judge Leavitt's order severing defendants, the
11 government still filed the superseding indictment against both Eaton and Shang, jointly, as co-
12 defendants. (#83). The defendant argues that the indictment's reference to Mrs. Eaton is prejudicial
13 to the defendant, as it gives the jury the impression that the alleged conspiracy is larger than it is, and
14 should be stricken accordingly. *Id.*

15 The government opposes the request to strike, and argues that the severance order simply
16 mandated that "co-defendants will not be tried together because certain evidence may not be admissible
17 against another defendant," and does not change the allegations that Eaton and Shang conspired together
18 or the allegations against defendant Shang as it relates to the conspiracy and scheme to defraud. (#94).
19 Thus, the government asserts, all Shang is entitled to is the removal of Eaton's name from the caption,
20 and not the striking of "any and all" reference to Eaton. *Id.*

21 **2. Relevant Law**

22 Pursuant to Moore's Federal Practice Criminal Procedure § 607.06, "[s]ome redactions, *such*
23 *as removal of codefendants who have been severed or who have pleaded out, are usually undisputed.*"
24 (emphasis added). A motion to strike surplusage should be denied if the words or name are an essential
25 element of the crime charged or relevant and material to the charge. *United States v. Terrigno*, 838 F.2d

1 371, 373 (9th Cir. 1988)

2 **3. Discussion**

3 The court finds that co-defendant Eaton’s name is neither material to, nor an essential element
4 of the crime charged, as the trials have been severed and defendant Eaton is now no different from any
5 other known co-conspirator alleged to have been involved. *Terrigno*, 838 F.2d 373. The government
6 concedes to striking Eaton’s name from the caption (#94), and the court orders the same. Further, if the
7 indictment is shown or read to the jury at any time, Eaton’s name is ordered stricken from pages three,
8 five, and six, as her name is not an essential element of the crime, and the fact of how much she was
9 paid and how she assisted Shang has no relevance to the charges against Shang. *Id.*

10 **B. Forfeiture Allegations**

11 **1. Arguments**

12 Defendant Shang argues that if the jury reads the million dollar forfeiture allegation, it will likely
13 presume that the alleged conspiracy was significantly more “magnificent” than the indictment’s
14 allegations allege. (#83). The government opposes the request, and asserts that since the forfeiture is
15 something that is dealt with *after* trial or a guilty plea, the jury will not be deciding the forfeiture
16 allegation and will not be presented with it. (#94). Therefore, no prejudice can occur. *Id.*

17 **2. Relevant Law**

18 “As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo
19 contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture
20 is sought, the court must determine what property is subject to forfeiture under the applicable statute.
21 If the government seeks forfeiture of specific property, the court must determine whether the
22 government has established the requisite nexus between the property and the offense. If the government
23 seeks a personal money judgment, the court must determine the amount of money that the defendant
24 will be ordered to pay.” Fed. R. Crim. P. 32.2(b)(1)(A).

25 . . .

1 **3. Discussion**

2 Since the jury is not determining whether the forfeiture provision is accurate or whether the
3 government has provided support for its forfeiture allegation, and the court will be addressing this issue
4 *after* trial, if the indictment is ever read or given to the jury, the indictment shall be redacted as to omit
5 the forfeiture provision in its entirety. *See* Fed. R. Crim. P. 32.2(b)(1)(A). The forfeiture provision
6 shall remain in the indictment for all other purposes.

7 **C. Paragraph 12(l)**

8 In the superseding indictment, paragraph 12(l) reads as follows: “After approximately 30 days,
9 the casino would attempt to collect the unpaid markers by attempting to cash the markers as checks
10 against the recruits' bank accounts. These checks were ultimately returned to the casino marked
11 insufficient funds or account closed.” (#57).

12 **1. Arguments**

13 Defendant argues that paragraph 12(l) should be stricken because it relates to the original
14 indictment, which alleged mail fraud, and not the superseding indictment, which alleges wire fraud.
15 (#83). Defendant Shang asserts that paragraph 12(k) already alleges that “the casino would be left with
16 the recruit's unpaid debt,” which negates the need for paragraph 12(l). *Id.* The allegation in paragraph
17 12(l) relating to the “after the fact” mailing, defendant argues, is not legally relevant, opens the door to
18 a prior defective charge, and should be stricken. *Id.*

19 The government asserts that the paragraph is relevant in demonstrating that the recruits' bank
20 accounts were emptied, and that this caused the casinos to suffer a monetary loss. (#94). The
21 government argues that there is nothing prejudicial about the factual allegations that warrant striking.
22 *Terrigno*, at 373.

23 **2. Relevant Law/Discussion**

24 The Ninth Circuit held that in order to strike a section of the indictment as surplusage, there must
25 be a finding that the section is both irrelevant and prejudicial. *Id.* Here, the court finds that there is no
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1 prejudice caused to the defendant by the inclusion of paragraph 12(l). The paragraph is relevant,
2 however, in demonstrating that the accounts were emptied or closed, causing the casinos to suffer a loss.
3 This allegation relates to the charge of wire fraud, in demonstrating that Shang and the other recruits
4 had a scheme to “obtain[] money or property by means of false or fraudulent pretenses, representations,
5 or promises...” 18 U.S.C. § 1349.

6 **D. Defendant Shang’s American Name**

7 **1. Arguments**

8 The superseding indictment refers to defendant Shang as “Jason Shang.” (#57). However,
9 defendant Shang alleges that his true American name is “Owen,” and that his son’s name is actually
10 “Jason.” (#83). Therefore, defendant Shang asks this court to amend the indictment to reflect his actual
11 name. *Id.* This would only change the “form” of the indictment and not the substance, defendant
12 argues, and would not create any prejudice. *Id.* Defendant Shang asserts that to not change the name
13 would subject his son to the “threat of being mistakenly accused of criminal charges or standing trial
14 in a separate state.” *Id.*

15 The government opposes the request to change the name, and asserts that the name “Jason” is
16 utilized because that is the alias that defendant used while committing the crimes alleged. (#94). The
17 government asserts that the alias “Jason” is necessary to connect the defendant to the accused acts, as
18 multiple witnesses the government intends on calling know the defendant as “Jason,” and are not
19 familiar with a person named “Owen.” *Id.* Referring to the defendant as Owen would cause confusion
20 to both the witnesses and the jury. *Id.* Further, the government asserts, “Jason,” is not a prejudicial
21 name, i.e. it does not include a prejudicial term which would cause the jury to judge defendant Shang
22 based on his name. *Id.*

23 **2. Relevant Law**

24 The Ninth Circuit has held that "making corrections of typographical errors or making changes
25 that are merely a matter of form are constitutionally permissible, and a portion of the indictment that

1 the evidence does not support may be withdrawn from the jury, provided nothing is thereby added to
2 the indictment and provided the remaining allegations charge an offense." *United States v. Dawson*,
3 516 F.2d 796 (9th Cir. 1975). Amending the indictment to conform the indictment to the accused
4 preferred name is proper as long as the offense charged is not changed and the rights of the defendant
5 are not prejudiced. *United States v. Perez*, 776 F.2d 797, 799 (9th Cir. 1985)(permitting the indictment
6 which originally named "Gregorio C. Perez Jr. aka Junior Perez," to be changed by amendment to
7 "Junior Cruz Perez."). "Only when proof of an alias is relevant to identifying the defendant should a
8 court allow its inclusion in the indictment and its subsequent introduction at trial." *United States v.*
9 *Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001).

10 **3. Discussion**

11 Here, defendant Shang identified himself to the alleged recruits, co-conspirators, and other
12 witnesses as "Jason Shang." During the course of the trial, if the witnesses identify and answer
13 questions about a Jason Shang, and the attorneys and the court refer to Owen Shang, there is a
14 possibility of confusion and disconnect in the minds of the jury. The name Jason will identify the
15 defendant as the individual alleged to have been engaged in the conspiracy, and will eliminate any
16 possibility of confusion. *Emuegbunam*, 268 F.3d 377, 394. Further, the name Jason in no way, on its
17 own, creates a prejudice in the minds of the jury. *United States v. Clark*, 541 F.2d 1016 (4th Cir.
18 1976)(stating that the court would have forbidden the use of the alias "Mauser" (a type of German gun)
19 in the indictment if the defendant had renewed his motion to strike). Therefore, the indictment shall not
20 be amended, and shall reflect the name of "JASON SHANG."

21 Accordingly, and for good cause shown,

22 IT IS ORDERED that defendant De Rong Shang's Motion To Strike Surplusage (#83) is
23 GRANTED in part and DENIED in part, as discussed above.

24 IT IS FURTHER ORDERED that defendant Shang's Motion for a Bill of Particulars (#84) is
25 DENIED, as discussed above.

1 IT IS FURTHER ORDERED that defendant Shang also filed a Motion To Compel Discovery
2 (#85) GRANTED, as discussed above. The government shall provide the requested documents by
3 Tuesday, January 24, 2012, at 4:00 p.m. Defendant may take Mr. To's deposition solely for the purpose
4 of preserving his testimony for trial.

5 DATED this 23rd day of January, 2012.

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8 **CAM FERENBACH**
9 **UNITED STATES MAGISTRATE JUDGE**
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